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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA,

Petitioner,

v.

SOUTH FLORIDA WATER MANAGEMENT DISTRICT,
CAROL WEHLE, EXECUTIVE DIRECTOR
UNITED STATES OF AMERICA
U.S. SUGAR CORPORATION,

Respondents.

MICCOSUKEE TRIBE OF INDIANS OF FLORIDA'S REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY IN SUPPORT OF PETITION 1

I. Certiorari Is Warranted Because This Case Presents An Exceptionally Important Question Of Statutory Interpretation Implicating National Interests In Water Quality And Enforcement Of The Clean Water Act 1

II. Certiorari Is Warranted Because EPA's Regulation Is Not Entitled To Deference Under This Court's Precedents 3

A. Deference to EPA's Interpretation is Improper Because the CWA's Plain Language Requires Permits for Water Transfers between Separate Bodies of "Navigable Waters" 3

B. Even if EPA's Regulation was a Reasonable Interpretation of an Ambiguous Statute, No Deference is Due under this Court's Decisions 4

III. Certiorari Is Warranted Because The Eleventh Circuit's Decision Upholding EPA's Regulation Conflicts With *Miccosukee* And Other Circuit Precedents 8

A. The Decision Below Conflicts with *Miccosukee* 8

B. The Decision Below Conflicts with Other Circuit Precedents..... 10

CONCLUSION 11

TABLE OF AUTHORITIES

CASES ***Page***

Barnhart v Sigmon Coal Co,
534 U.S. 438 (2002) 3

Barnhart v. Walton,
535 U.S. 212 (2002) 6

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001) 10

Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 451 F 3d 77 (2d Cir. 2006) 5, 10

Chevron U S A Inc v Natural Resource Defense Council, Inc., 467 U.S. 837 (1984) ..... *passim*

Deakins v. Monaghan,
484 U.S 193 (1988) 2

Dubois v United States Department of Agriculture,
102 F.3d 1273 (1st Cir. 1996) 5, 10

Garner v United States,
85 Fed. Cl. 756 (Fed. Cl. 2009) 5

Morrison v. National Australia Bank Ltd,
130 S. Ct. 2869 (2010) 6

National Cable & Telecommunications Association v Brand X Internet Services,
545 U.S. 967 (2005) 4, 5, 10

Padilla v. Hanft,
126 S. Ct. 1649 (2006) 2

Polar Tankers, Inc. v. City of Valdez,
129 S. Ct. 2277 (2009) 7

Smiley v. Citibank (South Dakota), N.A,
517 U S. 735 (1996) 6

South Florida Water Management District v Miccosukee Tribe of Indians,
541 U.S. 95 (2004) 2, 8, 9

United States v. Klein,
80 U.S. 128 (1871) 7

STATUTES AND RULES ***Page***

Statutes

33 U.S.C. § 1311 3

33 U.S.C. § 1361 3

Rules and Regulations

40 CFR 122.3 1

73 Fed. Reg. 33697 1

REPLY IN SUPPORT OF PETITION

I. Certiorari Is Warranted Because This Case Presents An Exceptionally Important Question Of Statutory Interpretation Implicating National Interests In Water Quality And Enforcement Of The Clean Water Act

To Petitioner, the Miccosukee Tribe of Indians of Florida ("Tribe"), this case presents an important issue because the "unitary waters" theory allows pollutants to be discharged into Tribal lands without a permit. Others believe the "unitary waters" theory is an issue that implicates water management activities across the country.

Certiorari is warranted to decide the important question of whether the language and purpose of the Clean Water Act ("CWA") reasonably permit a statutory construction that would allow the most polluted navigable waters to be pumped into the most pristine without an NPDES permit. The Environmental Protection Agency ("EPA") Regulation at issue here (73 Fed Reg. 33697; 40 CFR 122.3(i)), which the Eleventh Circuit found outcome-determinative and entitled to deference, allows just that result under the thoroughly discredited "unitary waters" theory. The Court should address whether the plain language of the CWA prohibits EPA's interpretation.

Only the United States (hereinafter "USA") opposes certiorari review. USA takes the position that the Eleventh Circuit correctly concluded that the CWA is susceptible to two conflicting interpretations, both of which are reasonable, and EPA's Regulation is therefore entitled to deference. No other party or *amicus* agrees, and a plain reading of the CWA refutes this argument

USA's suggestion that this Court should not grant certiorari because EPA "might" reconsider the Regulation is likewise a position shared by no one else in this case and not a persuasive argument against certiorari.[1] Moreover, given the history of broken promises to the Tribe by USA, any new promises of future action by EPA lack credibility.

Six years ago in *South Florida Water Management District v. Miccosukee*, 541 U.S. 95 (2004), the Tribe asked this Court to protect Tribal Everglades from pollutants being discharged without permits. This Court remanded *Miccosukee* for consideration by the district court of whether the canals and Tribal Everglades were meaningfully distinct, while criticizing, but leaving open for argument below, the "unitary waters" theory. The *Miccosukee* case remains unresolved, having been stayed by the district court pending resolution of this case. Since *Miccosukee*, the SFWMD and others continue to take the position that they can discharge without permits. The district court in this case concluded that the CWA was unambiguous with regard to the requirements for permits. Every other court that has considered the "unitary waters" theory has rejected it. Once again, the Tribe seeks review from this Court to protect its lands, and to resolve the issue left open in *Miccosukee* as to whether the "unitary waters" theory is inconsistent with the statute's plain language.

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[1] For example, USA's voluntary cessation of challenged conduct does not render the case moot because there is reasonable expectation that the wrong will be repeated. *Deakins v Monaghan*, 484 U.S 193, 200 n.4 (1988). And where "nothing prevents the Executive from returning to the road it earlier constructed and defended," its "voluntary cessation does not make a case less capable of repetition or less evasive of review" *Padilla v Hanft*, 126 S. Ct 1649, 1651 (2006) (Ginsburg, J., dissenting from denial of certiorari).

II. Certiorari Is Warranted Because EPA's Regulation Is Not Entitled To Deference Under This Court's Precedents

A. Deference to EPA's Interpretation is Improper Because the CWA's Plain Language Requires Permits for Water Transfers between Separate Bodies of "Navigable Waters"

Contrary to USA's argument, the CWA is *not* ambiguous as to whether a water transfer is subject to the NPDES permit requirements U.S.A. at 10. Therefore, no deference is owed to EPA's Regulation. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002).

USA attempts to inject ambiguity into an otherwise plain statute by using an "absent any" argument, just as the Eleventh Circuit did. USA at 10-11. Because the word "any" does not appear before "navigable waters" in Section 301(a) (codified, 33 U.S.C. § 1311(a)), USA argues that the statute should be interpreted to mean that waters of the United States are a unitary whole. *Id* But as the Tribe pointed out, the "absent any" argument was not the focus of EPA in promulgating the Regulation and thus no deference is owed under that theory. Tribe's Pet. at 17. The Eleventh Circuit merely adopted EPA's litigation position below, which is not the same as giving deference to an agency's interpretation of an ambiguous statute. *Id*

Moreover, a key term in the Section 1361(12) language "any addition of any pollutant to navigable waters from any point source" is the phrase "any addition." Tribe's Pet. at 17-18 As the district court here found, that term unambiguously means that permits are required whenever there is something *added* to "navigable waters." The *Miccosukee* Court concluded that the "addition" must be from another

meaningfully distinct body of water. *Id.* The "unitary waters" theory is inconsistent with this Court's interpretation of "addition" and USA offers no persuasive explanation of its litigation position adopted as a Regulation.

Likewise, USA offers no response to the Tribe's argument that "navigable waters" is used in the statute as a jurisdictional term to identify those bodies of water that are subject to federal regulation, and that the originating location or character of the waters being discharged into "navigable waters" is not decisive under the statute. *Id.* at 18-19. What matters for determining if there is a "discharge" is whether there has been "any addition" of pollutants from another meaningfully distinct body of water.

B. Even if EPA's Regulation was a Reasonable Interpretation of an Ambiguous Statute, No Deference is Due under this Court's Decisions

Even assuming the Regulation was a reasonable construction of an ambiguous statute, USA is wrong that the Eleventh Circuit properly accorded deference.

Pursuant to *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), the prior decisions of the First and Second Circuit and district court below, finding the statute unambiguous, should control over EPA's subsequent interpretation. Tribe's Pet. at 19-20. USA argues that this is not so because no "binding precedent" prevented the Eleventh Circuit from deferring to EPA under *Chevron*. U.S.A. at 16. This argument incorrectly interprets *Brand X*. This Court did not hold, as USA suggests, that only *binding* precedent finding a statute unambiguous can control over a subsequent agency decision. *Brand X*, 545 U.S at 982-83. This Court spoke in terms of "judicial precedent," *id.* at 982, which connotes

merely "[a] decided case that furnishes a basis for determining later cases involving similar facts or issues," *Garner v United States*, 85 Fed. Cl. 756, 759 (Fed. Cl. 2009) (quoting Black's Law Dictionary). By contrast, "binding precedent" means "[a] precedent that a court must follow." *Id.*

The Second Circuit's determination in *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 451 F.3d 77, 85 (2d Cir. 2006), is "precedent" which found that the "unitary waters" theory conflicts with the plain language of the CWA. Indeed, in that case the court repeatedly said that its decision was mandated by "the text of the CWA" and the statute's "plain language."[2] *Id* at 85. For the same reasons, the First Circuit's decision in *Dubois v. U.S.D.A.*, 102 F.3d 1273, 1299 (1st Cir. 1996) is also precedent that controls. Thus, contrary to USA's position, a fair interpretation of *Brand X* is that deference to the agency was foreclosed by prior judicial precedent from other circuits.[3]

USA argues it does not matter that EPA's interpretation

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[2] USA contends that the Second Circuit's ruling should be ignored because *Catskill II* was decided before the Regulation was promulgated and thus did not address the precise question presented here. U S A. at 16. This argument has no merit. *Brand X*, by its very terms, addresses the force of a prior judicial decision when a court is confronted with a *subsequent* agency interpretation 545 U.S at 982-83 Moreover, when deciding *Catskill II*, the Second Circuit was aware of the proposed regulations, which changed only slightly upon issuance 451 F 3d at 82

[3] As the Tribe noted in its Petition, at the very least there remains a question as to the force that prior judicial determinations of no ambiguity *by a sister circuit* carry under *Brand X*'s agency-reversal rule, and *Brand X*'s application in that regard is another question which review could appropriately resolve.

was previously rejected, citing *Barnhart v. Walton*, 535 U.S. 212, 221 (2002). But USA fails to even mention the import of *Morrison v National Australia Bank Ltd.*, 130 S. Ct. 2869, 2887 (2010) which, as the Tribe explained, suggests no deference was due since the "unitary waters" theory was rejected as unreasonable by courts employing the usual tools of construction (and looked upon with skepticism by this Court) Tribe's Pet. at 23.

That the Regulation constitutes a mere *post hoc* rationalization and convenient adoption of EPA's litigating position is yet another reason, under this Court's precedent, that the Eleventh Circuit wrongly accorded deference. Tribe's Pet. at 24-25. USA argues that this is not so, citing as the Eleventh Circuit did, three cases, including *Smiley v. Citibank*, 517 U.S. 735, 740-41 (1996). U.S.A. at 13-15. As the Tribe's Petition explained, however, none of those cases involved, as here, the adoption by the agency of a case-decisive losing litigation position in order to reverse the outcome of the case on appeal. Tribe's Pet. at 26-27.

USA characterizes *Smiley* as a case in which *Chevron* deference was given to "a rule adopted after, and in direct response to, the lower court decision in that case[.]" U S.A. at 14-15 That characterization is misleading. The circumstances of *Smiley* are different because the rule was not adopted until after the state supreme court issued its decision, and there is no indication that the rule adopted a mere losing argument in the trial court, intermediate appellate court, or state supreme court Here, the proposed language of the Regulation was presented as argument to the district court, which rejected it out of hand. Then, after appellate briefing, the Regulation was adopted and submitted to the court as supplemental authority under Rule 28(j), in order to

invoke *Chevron* review and change the outcome of the case.[4] The Eleventh Circuit should have bound USA to the theories argued below in order to avoid prejudice to the Tribe and Plaintiffs, who did not have an opportunity to brief arguments relating to the final Regulation

To that end, the Eleventh Circuit's decision permitted an executive agency to manipulate the case's outcome in violation of separation of powers.[5] USA argues that the Tribe's reliance on *United States v. Klein*, 80 U.S. 128 (1871) is incorrect, but fails to respond to the argument that *Klein*, even as limited by progeny, applies because Congress has not changed the law. This Court has said that *Klein*'s holding remains in full force except where Congress amends applicable law. Because no law was amended here, EPA's promulgation of the Regulation, after briefing in the Eleventh Circuit so as to invite *Chevron* deference, presents a separation of powers problem under *Klein*.

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[4] USA's submission of the Regulation during the appeal – by way of a Rule 28(j) letter – was highly prejudicial, procedurally improper, and violated the prudential rule that parties cannot raise new issues or arguments by supplemental authority

[5] USA argues that this Court should not consider the separation of powers argument because it was not raised in the petitions for rehearing below. U S A. at 18 n.7. Given that EPA did not adopt the Regulation until after briefing in the appeal and that petitions for rehearing are not prerequisites to Supreme Court review, this argument lacks merit. Because USA has manipulated the outcome by waiting to issue the Regulation after briefing was complete, it is estopped from attempting to prevent the Tribe from raising the argument Moreover, "[this Court] may make exceptions to [its] general approach to claims not raised below," especially where "the parties have argued the matter in their briefs here; and [the Court's] deciding the matter now will reduce the likelihood of further litigation" *Polar Tankers, Inc v City of Valdez*, 129 S. Ct 2277, 2286 (2009)

The only answer provided by USA is that "Congress intended to vest EPA with significant discretion, and the water-transfer rule is a permissible exercise of that discretion." USA at 18. The issue, however, is not whether Congress vested discretion in the agency to promulgate regulations The issue is whether the circumstances under which the agency promulgated the Regulation here pose a separation of powers issue. Clearly they do. EPA's promulgation of the Regulation after briefing in the appellate court was specifically targeted to change the case's outcome and implicates separation of powers.

III. Certiorari Is Warranted Because The Eleventh Circuit's Decision Upholding EPA's Regulation Conflicts With *Miccosukee* And Other Circuit Precedents

A. The Decision Below Conflicts with *Miccosukee*

Rather than showing no conflict exists, USA mentions various facts about *Miccosukee* which support the Tribe's position. For instance, there is no dispute that an NPDES permit is required to convey water from one meaningfully distinct body of water to another. U.S.A. at 6 n.2. The Eleventh Circuit upheld the district court's finding that the canals and Lake Okeechobee were "meaningfully distinct water bodies." *Id.* at 7 n.3. Additionally, this Court held the term "point source" includes structures that are not the original source of the pollutant. *Id.* at 5; *Miccosukee*, 541 U.S. at 105 (holding "untenable" the position that a point source must be original source of pollution). These facts support the argument that the transfer of pollutants from one distinct water body into another requires a permit, regardless of whether both bodies are waters of the United States.

Yet, USA continues to assert that pumping polluted water from the canals into Lake Okeechobee does not constitute a

discharge of pollutants because waters of the United States are "unitary." Such a construction eviscerates the CWA and is not supported by the statute's plain language.

The Eleventh Circuit's holding, which found the Regulation reasonable, is inconsistent with *Miccosukee* because the conveyances in question involve pumping water from one distinct, polluted water body into another distinct water body that is also a drinking source. This activity is clearly subject to NPDES permitting both under the Eleventh Circuit's own ruling that the water bodies involved are meaningfully distinct, and under this Court's ruling that an NPDES permit is required to convey polluted water from one meaningfully distinct body to another. Under EPA's Regulation, however, water transfers involving two bodies of "navigable waters" are exempt from permit requirements *unless* pollutants are injected during and by the transferring activity itself. In other words, the Regulation requires that the point source *must* be the original source of the pollutant – a conclusion that is exactly the opposite of this Court's holding in *Miccosukee*. Thus, when the Eleventh Circuit found the Regulation reasonable, it created a conflict with *Miccosukee*, which this Court should resolve. [6]

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[6] This Court left the "unitary waters" theory open on remand, but the Court never held that the theory, if made a regulation, would be entitled to deference under *Chevron*. The Court in fact expressed skepticism toward the theory and its reasonableness, noting several potential inconsistencies that might foreclose it *Miccosukee*, 541 U.S at 107-08

B. The Decision Below Conflicts with Other Circuit Precedents

Both *Dubois*, 102 F.3d at 1273, and *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481 (2d Cir. 2001) ("*Catskill I*"), *adhered to on reconsideration*, 451 F.3d at 77 (2d Cir. 2006) ("*Catskill II*"), held the "unitary waters" theory untenable under the CWA's plain language. That the First and Second Circuits had no occasion to consider EPA's Regulation is irrelevant because both courts considered the "unitary waters" theory and found it unreasonable

Under *Brand X*, 545 U.S. at 982-83, therefore, the *Chevron* framework would not apply because both circuit holdings were based on the clear statutory language and those prior precedents would defeat EPA's subsequent contrary interpretation. In other words, had the "unitary waters" Regulation been challenged in the First or Second Circuits, rather than in the Eleventh Circuit, the Regulation would have been rejected and not accorded deference under existing First and Second Circuit law. This conflicts with the Eleventh Circuit's opinion, which holds the Regulation reasonable. It also creates the anomalous result that a Regulation can be upheld in one circuit under *Chevron* while in other circuits rejected pursuant to *Brand X*

Even if *Chevron* were applicable, however, the Regulation would still have to be rejected under First and Second Circuit precedents under step one of *Chevron* because both circuits concluded the "unitary waters" theory was inconsistent with the CWA's plain language. *Catskill II*, 451 F.3d at 84-85 The theory would likewise be rejected as unreasonable under *Chevron* step two. Indeed, the *Dubois* court called the theory "irrational," *Dubois*, 102 F.3d at 1297, and *Catskill II* found it "absurd." *Catskill II*, 451 F.3d at 81.

Thus, both the First and Second Circuits found the "unitary waters" theory was an unreasonable interpretation of the plain statutory language. In stark contrast, the Eleventh Circuit found the statutory language was not plain, and that the "unitary waters" theory was a reasonable interpretation.

CONCLUSION

For these reasons and those in the Tribe's Petition, the Court should grant certiorari.

Respectfully submitted,

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